

PROCEDURES FOR GRANTING OF DEFAULT JUDGMENTS
IN THE
UNITED STATES BANKRUPTCY COURT
FOR
THE WESTERN DISTRICT OF NEW YORK

Before seeking default judgment, plaintiff's attorney should make certain that he or she has (1) properly and timely served the defendant and (2) filed an accurate certificate of service. Then, once the time to answer has expired, he or she may seek entry of default judgment, following procedures described below. *If a debtor is a defendant, even if he/she fails to file a timely answer, the plaintiff must bring a default judgment by motion in accordance with Rule 55(b) made applicable by Fed.R.Bankr.P Rule 7055.¹ (If a suggested form is not used, all of the same information must nonetheless be provided to the Court in a similar form.)

I. WHEN THE UNDERLYING ACTION IS A CORE MATTER:²

A.

The Clerk of the Court (Paul R. Warren) may enter the default judgment if:

the underlying action is a core matter

and

the default judgment is for a sum certain³

In order to obtain a default judgment in this circumstance, the attorney for the plaintiff is to file (1) an Application For Default Judgment [suggested form D-1] addressed to the Clerk of Court; (2) a Certificate of Default [suggested form D-2]; (3) a Request For Judgment by Default and Affidavit of Amount Due [suggested form D-3]; (4) an Affidavit of Non-Military Service [suggested form D-4].

B.

When the action is a core matter, but not for a sum certain, then suggested forms D-1 and D-2 must be submitted to the Clerk, but suitable application must be made to the Judge [with a proposed order directing entry of judgment] in order to obtain judgment.

¹See In re Emmerling; B.R. 1997 WL998674 (Bankr.2nd Cir. 1997).

²See § 157(b)(2) of Title 28 United States Code, as amended 7/84.

³Note that the judgment includes more than a sum certain when it expressly or implicitly includes a threshold equitable decree such as a declaration that a debt is nondischargeable or that a payment was a preferential transfer.

II. WHEN THE UNDERLYING ACTION IS A NON-CORE MATTER:⁴

A.

The Bankruptcy Judge to whom the matter had been assigned⁵ may execute a recommendation that default judgment be entered, but final judgment (even default judgment) must be entered by and in the District Court for the Western District of New York.

In order to obtain such a recommendation, the plaintiff's attorney is to file D-1 and D-2 as above, and additionally: (1) an Affidavit of Non-Military Service [suggested form D-4]; (2) an Order to Transmit Record in a Non-Core Proceeding to District Court, combined with Findings of Fact, Conclusions of Law and Recommendation Regarding Plaintiff's Request for Entry of Default Judgment [suggested form D-5]; and (3) an Affidavit of Amount Due [suggested form D-6]; and (4) Order (for Execution by U.S. District Judge) [suggested form D-7].

B.

If the Bankruptcy Judge, on the basis of the submitted Recommendation for Default Judgment, determines that a hearing is necessary, his secretary will inform the parties of the date of that hearing. (For example, if the defendant appeared, but did not answer, the defendant has a right to be heard on the question of the amount of damages.) After that hearing, the plaintiff's attorney is to submit a revised Order to Transmit [suggested form D-5], a revised Affidavit of Amount Due [suggested form D-6], and an Order execution by the U.S. District Judge) [suggested form D-7].

⁴See § 157(c), Title 28 United States Code, as amended 7/84.

⁵The last digit of the Buffalo case number is followed by a letter; if the letter is "K", the case is before Judge Kaplan; if the letter is "B", the case is before Judge Bucki.

SUGGESTED FORM D-1

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE

APPLICATION FOR ENTRY
OF DEFAULT
Case No. _____

Debtor

Plaintiff

v.

A.P. No. _____

Defendant

1. On _____, a copy of the summons and complaint was served on _____, the Defendant, and the certificate of service of _____ was filed in this Court on _____.

2. Defendant, _____, has failed to plead or otherwise defend in this action, and the time to plead or otherwise defend expired on _____.

[] Defendant **has** appeared in this action (explain nature of appearance;

[] Defendant **has not** appeared in this action, and the time to appear has expired.

3. The Defendant is not an infant or incompetent person.

4. Debtor [] is [] is NOT the Defendant. If debtor is Defendant, a default judgment motion was properly brought and served in accordance with Rule 55 and Fed.R.Bankr.P. Rule 7055.

5. It is requested that the Clerk enter default of the Defendant pursuant to Bankruptcy Rule 7055 and Rule 55(a) of the F.R.C.P.

6. I, _____, plaintiff, or principal of the Plaintiff, declare under penalty of perjury that the foregoing is true and correct.

Executed: _____
(Signature)

SUGGESTED FORM D-2
CLERK'S CERTIFICATE OF DEFAULT

The default of the Defendant, _____, is hereby entered according to law.

Dated: _____
MARTIN H. OOGJEN III, Clerk

SUGGESTED FORM D-3

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF NEW YORK

IN RE

REQUEST FOR JUDGMENT
BY DEFAULT AND
AFFIDAVIT OF AMOUNT DUE

Case No. _____

Debtor

Plaintiff

v.

A.P. No. _____

Defendant

TO THE CLERK:

Pursuant to the attached Application for Entry of Default Judgment, Defendant having failed to appear and Defendant not being an infant or incompetent person, and the time for appearance having expired with Defendant's Fact of Default having been entered as certified above by the Clerk, you are requested to enter a default judgment in favor of the Plaintiff and against the Defendant in the principal sum of \$_____, plus interest in the sum of \$_____ based on § of _____ (at the rate of _____ %, through the date of application), and costs in the sum of \$_____, making a total amount due of \$_____.

Dated: _____

(Signature)

(Affirmed under penalty of perjury)

SUGGESTED FORM D-4
AFFIDAVIT OF NON-MILITARY SERVICE

I, _____, am the attorney for the Plaintiff in the above action.

I have made an investigation to ascertain if Defendant in this proceeding is in the military service of the United States. The results of my investigation are as follows.

From the facts set forth above, I am convinced the Defendant is not in the military service of the United States as defined in the Soldiers' and Sailors' Civil Relief Act of 1940.

Dated: _____

(Signature)
(Affirmed under penalty of perjury)

SUGGESTED FORM D-5

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE

Case No. _____

Debtor

Plaintiff

v.

A.P. No. _____

Defendant

ORDER TO TRANSMIT RECORD IN NON-CORE PROCEEDING TO DISTRICT
COURT, COMBINED WITH FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDATION REGARDING PLAINTIFF'S REQUEST FOR ENTRY
OF DEFAULT JUDGMENT

The Clerk of Bankruptcy Court is directed to transmit this Adversary Proceeding to the District Court for consideration of the following, pursuant to P.L. 98-353 (The Bankruptcy Amendments and Federal Judgeship Act of 1984).

TO THE DISTRICT COURT:

Having examined the record in this Adversary Proceeding and having found it to be a non-core proceeding, the Bankruptcy Court is without authority to enter a final or dispositive order or judgment. (See, § 157(c), Title 28 United States Code). Plaintiff has requested entry of default judgment.

This Court has determined that:

[] No hearing was necessary.

[] A hearing was necessary, which hearing was held on _____
at _____,
on notice to _____
at which hearing there appeared _____
who was heard.

(over)

(2)

FINDINGS

This Court now finds that the Complaint was filed by the Plaintiff on _____; that an affidavit of service was filed attesting to service of the Summons and a copy of the Complaint; that the Defendant failed to plead or otherwise defend within the time prescribed by law and rule; that the Plaintiff has duly and timely requested entry of judgment by default, by application or affidavit filed in this Court on _____; and that the Clerk certified and entered the Fact of Default on _____.

CONCLUSIONS

The Plaintiff is entitled under applicable law to entry of judgment by default.

RECOMMENDATION

Wherefore, it is recommended that the District Court award default judgment to the Plaintiff in the amount of \$_____ (plus the allowed per diem amount which accumulated since the application for default), which amount is fully itemized in the attached Amount Due [suggested form D-6].

Date: _____

U.S.B.J.

SUGGESTED FORM D-6

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE

AFFIDAVIT OF AMOUNT
DUE

Case No. _____

Debtor

Plaintiff

v.

A.P. No. _____

Defendant

In support of the Plaintiff's request that the Bankruptcy Court recommend and the District Court enter default judgment against the above named Defendant, the Plaintiff submits the following itemization of damages sought:

Principal amount prayed for in complaint _____

Pre-judgment interest⁶ _____

Costs (for _____) _____

Attorney's Fees⁷ _____

TOTAL DAMAGES _____

Plus per diem of _____
since the date of the filing
plaintiff's request for default _____

Date: _____

(Signature of Plaintiff/Attorney)

⁶Based on § _____ of _____; at the
rate of _____ since _____, through
the date of the filing of the request.

⁷ See § 1923, Title 28 United States Code.

SUGGESTED FORM D-7

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE

ORDER

Case No. _____

Debtor

Plaintiff

v.

A.P. No. _____

Defendant

Based on the annexed Recommendation and Certification, it is

ORDERED, ADJUDGED AND DECREED that a default judgment be
entered against the above named Defendant, in the amount of

\$_____.

Date: _____

U.S.D.J.

